

BETH INNOCENTI MANOLESCU

Kames's Legal Career and Writings as Precedents for *Elements of Criticism*

Abstract: Scholars have seldom explored relationships among Lord Kames's legal career and writings and *Elements of Criticism*. After considering why Kames did not write a rhetoric of legal advocacy, I argue that Kames's legal career and writings offered precedents for *Elements* in three areas: fulfilling social aspirations, using principles of human nature for pedagogical purposes, and using a mode of reasoning that involved abstracting principles from particular cases. I provide a more complete understanding of the *Elements* and suggest that aims and methods of Scots law may have penetrated eighteenth-century Scottish rhetorics more broadly.

Henry Home, Lord Kames was an advocate and judge on Scotland's supreme civil and criminal courts, and was involved in the legal profession from about 1712 when he probably began to study law until a few months before his death in 1782.¹ Although like other Scottish *literati* Kames published on a variety of topics, including agriculture, natural history, and moral

¹Two twentieth-century biographies are Ian Simpson Ross, *Lord Kames and the Scotland of His Day* (Oxford: Oxford University Press, 1972) and William C. Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment: A Study in National Character and in the History of Ideas* (The Hague: Martinus Nijhoff, 1971). For an overview of Kames's career with particular attention to his legal works, see David M. Walker, *The Scottish Jurists* (Edinburgh: W. Green, 1985), 220–47. Three important sources of biographical material from Kames's contemporaries are: John Ramsay, *Scotland and Scotsmen in the Eighteenth Century*, 2 vols., ed. Alexander Allardyce (Edinburgh, 1888); Alexander Fraser Tytler, Lord Woodhouselee, *Memoirs of the Life and Writings of the Honourable Henry Home of Kames*, 2nd ed., 2 vols. (Edinburgh, 1814); and James Boswell, *Private Papers of James Boswell from Malahide Castle*, vol. 15, eds. Geoffrey Scott and Frederick A. Pottle (N.p., 1932).

philosophy, most of his publications are on legal subjects and cover a range of areas: four collections of decisions of the Court of Session and a collection of statute law, two collections of essays on particular titles in Scots law, two historical treatments of legal subjects, and a work on equity. His legal writings span his entire career: *Remarkable Decisions of the Court of Session. From 1716 to 1728* (1728); *Essays Upon Several Subjects in Law* (1732); *The Decisions of the Court of Session, from its first Institution to the Present Time. Abridged, and Digested under proper Heads, in Form of a Dictionary* (1741); *Statute Law of Scotland Abridged. With Historical Notes* (1757); *Essays upon Several Subjects concerning British Antiquities* (1747); *Historical Law-Tracts* (1758); *Principles of Equity* (1760); *Remarkable Decisions of the Court of Session. From the year 1730 to the year 1752* (1766); *Elucidations Respecting the Common and Statute Law of Scotland* (1777); and *Select Decisions of the Court of Session. From the year 1752 to the year 1768* (1780).²

Historians and philosophers of legal thought have discussed Kames's legal works, but students of rhetoric remember Kames for *Elements of Criticism* (1762).³ With one exception,⁴ neither group has

²Kames's *Essays on the Principles of Morality and Natural Religion* (1751) is a moral work, but for a discussion of it as well as *Essays on Several Subjects in Law* and *Essays upon Several Subjects Concerning British Antiquities* from a legal perspective, see Duncan Forbes, "Natural Law and the Scottish Enlightenment," in R. H. Campbell and Andrew S. Skinner eds., *The Origins and Nature of the Scottish Enlightenment* (Edinburgh: John Donald, 1982), 186–204 (pp. 197–9). For a list of Kames's publications see Ronald Hamowy, *The Scottish Enlightenment and the Theory of Spontaneous Order* (Carbondale: Southern Illinois University Press, 1987), 57–9.

³Discussions of his legal works include Peter Stein, "Legal Thought in Eighteenth-Century Scotland," *Juridical Review* n. s. 2 (1957): 1–20 (pp. 9–12); David M. Walker, "Equity in Scots Law," *Juridical Review* 66 (1954): 103–47; David Lieberman, "The Legal Needs of a Commercial Society: the Jurisprudence of Lord Kames," in Istvan Hont and Michael Ignatieff eds., *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1983), 203–34; and the two chapters on Kames in David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989). On Scots law and the Enlightenment with reference to Kames and others, see Neil MacCormick, "Law and Enlightenment," in R. H. Campbell and Andrew S. Skinner eds., *The Origins and Nature of the Scottish Enlightenment* (Edinburgh: John Donald, 1982), 150–66; and on capital punishment in particular, see Ferenc Hörcher, "Beccaria, Voltaire, and the Scots on Capital Punishment: A Comparative View of the Legal Enlightenment," in Deidre Dawson and Pierre Morère eds., *Scotland and France in the Enlightenment* (Lewisburg: Bucknell University Press, 2004) 305–30 (pp. 317–22).

⁴Ian Simpson Ross, "Scots Law and Scots Criticism: The Case of Lord Kames," *Philological Quarterly* 45 (1966): 614–23 and *Kames*, cited in n. 1 above, pp. 262–5, discusses *Elements* in relation to Scots law in general more so than Kames's legal writings in particular. Ross links the title and organization of *Elements* to works

explored relationships among Kames's legal career and writings and *Elements*, perhaps because his legal works do not cover the topic of pleading and because *Elements* is a rhetoric of criticism—it recommends how to make arguments on matters of taste rather than how to make legal arguments.⁵ In this essay I argue that his legal career and writings offer precedents for *Elements*. I do not deny that *Elements* is a product of a number of thinkers and traditions, including Shaftesbury and Hutcheson,⁶ Hume,⁷ Newtonianism,⁸ the mechanist tradition,⁹ or French criticism;¹⁰ nor do I deny that *Elements* is shaped by its broader sociopolitical context.¹¹ But highlighting legal precedents offers insight into the organization, content, and reasoning of *Elements*, a work often read with respect to histories of literary or aesthetic ideas and sometimes with respect to rhetorical traditions;¹² and it continues the project of relating eighteenth-century

by Mackenzie and Stair respectively. He notes that induction and historical and comparative awareness characterize both the legal writing and *Elements*, and that Kames's view of taste as analogous to the moral sense is consistent with his advocacy of a duty-oriented legal system.

⁵Beth Innocenti Manolescu, "Motives for Practicing Criticism as a 'Rational Science' in Lord Kames's *Elements of Criticism*," *Advances in the History of Rhetoric* 5 (2001): 11–20 (p. 12) and "Traditions of Rhetoric, Criticism, and Argument in Lord Kames's *Elements of Criticism*," *Rhetoric Review* 22 (2003): 225–42.

⁶Vincent M. Bevilacqua, "Lord Kames's Theory of Rhetoric," *Speech Monographs* 30 (1963): 309–27 (p. 313); Ross, "Scots," cited in n. 4 above, pp. 620–1; Ross, *Kames*, cited in n. 1 above, pp. 264–5.

⁷Arthur E. McGuinness, *Henry Home, Lord Kames* (New York: Twayne Publishers, 1970), 62.

⁸Helen Whitcomb Randall, "The Critical Theory of Lord Kames," *Smith College Studies in Modern Languages* 22 (1940–41): 23–27; Bevilacqua, "Lord," cited in n. 6 above; compare Ross, *Kames*, cited in n. 1 above, p. 262. On Newtonianism in Scottish scientists and moralists see Roger L. Emerson, "Science and the Origins and Concerns of the Scottish Enlightenment," *History of Science* 26 (1988): 333–66.

⁹Gordon McKenzie, "Lord Kames and the Mechanist Tradition," *University of California Publications in English* 14 (1943): 93–121.

¹⁰James Boswell, *Life of Johnson*, ed. R. W. Chapman (Oxford: Oxford University Press, 1980), 414–5.

¹¹Manolescu, "Traditions" and "Motives," cited in n. 5 above.

¹²For literary and aesthetic approaches see for example Murray W. Bundy, "Lord Kames and the Maggots in Amber," *Journal of English and German Philology* 45 (1946): 199–208; Walter John Hipple, Jr., "Lord Kames," *The Beautiful, the Sublime, and the Picturesque in Eighteenth-Century British Aesthetic Theory* (Carbondale: Southern Illinois University Press, 1957) 99–121; András Horn, "Kames and the Anthropological Approach to Criticism," *Philological Quarterly* 44 (1965) 211–33; McKenzie, cited in n. 9 above. For rhetorical approaches, see for example Vincent M. Bevilacqua, "Rhetoric and Human Nature in Kames's *Elements of Criticism*," *Quarterly Journal of Speech* 48 (1962): 46–50, and Bevilacqua, "Lord," cited in n. 6 above; Neil Rhodes, "From

Scottish rhetorics to their authors' "other" works.¹³ *Elements* is of particular interest since it offers a rare opportunity to explore the relationship of rhetoric to law in eighteenth-century Scotland.¹⁴ To the extent that *Elements* influenced the thinking and writing of others on rhetoric,¹⁵ and that it was Kames (and Hutcheson) "who first laid out the contours of this new cultural landscape" of the Scottish Enlightenment,¹⁶ Kames's legal career and writings may be more important to understanding the origins of Scottish Enlightenment rhetorics than heretofore recognized.

After considering why Kames did not write a legal rhetoric, I argue that Kames's decision to study and write about law to fulfill his social aspirations offered a precedent for studying and writing about criticism; that using principles of human nature partly for pedagogical purposes in his legal works offered a precedent for using them in *Elements*; and that the mode of reasoning used to compile collections of legal decisions offered a precedent for the mode of critical reasoning recommended in *Elements*.

WHY NOT A LEGAL RHETORIC?

One answer to the question of why Kames did not write a rhetoric of legal advocacy is that on occasion he used the term "rhetoric" to

Rhetoric to Criticism," *The Scottish Invention of English Literature*, ed. Robert Crawford (Cambridge: Cambridge University Press, 1998), 22–36; Manolescu, "Motives" and "Traditions," cited in n. 5 above.

¹³On Campbell see Arthur E. Walzer, *George Campbell: Rhetoric in the Age of Enlightenment* (Albany: State University of New York Press, 2003). On Smith see Stephen J. McKenna, "Fitting Words: Propriety in Adam Smith's Rhetoric and Ethics," in Lynne Lewis Gaillet ed., *Scottish Rhetoric and its Influences* (Mahwah, NJ: Hermagoras Press, 1998), 57–65.

¹⁴Perhaps the only other Scottish legal professional who wrote a rhetoric is George Mackenzie who composed "What Eloquence is fit for the Bar" (1672) and "Idea eloquentiae forensis hodierni" (1681); see Beth Innocenti Manolescu, "George Mackenzie on Scottish Judicial Rhetoric," *Rhetorica* 20 (2002): 275–88. John W. Cairns, "Rhetoric, Language, and Roman Law: Legal Education and Improvement in Eighteenth-Century Scotland," *Law and History Review* 9 (1991): 31–58 focuses on theories of rhetoric in relation to the teaching of law.

¹⁵See for example Bevilacqua, "Rhetoric," cited in n. 12 above, pp. 49–50 and "Lord," cited in n. 6 above, pp. 323–7; Tytler, *Memoirs*, vol. 1, cited in n. 1 above, pp. 159–60.

¹⁶Arthur Herman, *How the Scots Invented the Modern World: The True Story of How Western Europe's Poorest Nation Created our World and Everything in it* (New York: Crown, 2001), 55.

refer to a fine art but viewed legal advocacy as above all a practical art. Although Kames does not use the word "rhetoric" in *Elements*, in his *Sketches of the History of Man* (1774) he classifies both "rhetoric" and "eloquence" as fine arts.¹⁷ In part this reflects a broader cultural movement away from Ciceronian eloquence. As such, *Elements* is an exemplar of a transition from the study of rhetoric as civic oratory to rhetoric as belletristic criticism.¹⁸ Kames could have chosen to write a rhetoric more in the classical tradition as did John Ward, for example; but instead he chose to write a new rhetoric. I submit that he chose to do so—that he would have held that eloquence conceived as a fine art is inappropriate in legal advocacy—in part for personal and institutional reasons.

Personal reasons include Kames's own lack of eloquence. Tytler has reported that Kames "wanted that command of copious elocution which is necessary for an extemporaneous discussion of a laboured argument."¹⁹ Kames admits as much in an anecdote reported to Boswell:

Lockhart, who was certainly one of the ablest barristers of his time, was my antagonist in an action of damages for oppression and illegal imprisonment. He made a most violent speech for the prosecutor, represented my client as a monster, and with that inflammatory eloquence of which he was so much a master, made a deep impression, as I perceived, on the minds of the Judges. I was no match for him in this kind of rhetoric, but I took a more effectual ground of defence. I saw that the facts in evidence gave no support to the charge, to the extent which my adversary had pushed it, and that all his philippic was a brutum fulmen, which a plain statement of the evidence would dissipate in a moment. This I gave in a few sentences, and with great coolness; saying, that I left it to the Court to make the commentary, and to judge what foundation my brother had for all his heat and intemperance. I need not tell you that I was completely successful.²⁰

¹⁷Lord Kames, *Sketches of the History of Man*, vol. 1 (Edinburgh, 1774), 70.

¹⁸On the transition generally, see Wilbur Samuel Howell, *Eighteenth-Century British Logic and Rhetoric* (Princeton: Princeton University Press, 1971), 441–7; and Neil Rhodes, "From Rhetoric to Criticism," in Robert Crawford ed., *The Scottish Invention of English Literature* (Cambridge: Cambridge University Press, 1998), 22–36. On political motivations for the transition, see Adam Potkay, *The Fate of Eloquence in the Age of Hume* (Ithaca: Cornell University Press, 1994). On the significance of *Elements* with respect to methods of practicing criticism, see Manolescu, "Traditions," cited in n. 5 above.

¹⁹Tytler, *Memoirs*, vol. 1, cited in n. 1 above, p. 64.

²⁰Boswell, *Private*, cited in n. 1 above, p. 281.

Kames's successful, brief, and cool statement of the evidence points to institutional reasons for the impropriety of eloquence in legal advocacy: it was inefficient and could lead to suspicion. Inefficiency was of particular concern in civil trials where little pleading was involved; most of the business of the court was done in writing. The exchanges of papers between advocates and judges led to a "prolixity of written pleadings and arguments," which resulted in a procedure that was "unduly cumbrous and dilatory for transacting the day-to-day business of the court."²¹ As Ramsay has put it, "much speaking is not the way to despatch [*sic*] much business."²² Significantly, Kames reported to Boswell that he first gained notice through a concise legal paper. Lord Minto, a member of the Court of Session, praised Kames for his ranking of an estate. "Mr. Home," Kames recalled Minto saying, "I am glad to see your name to this paper. You have done just like a good Mathematician: thrown out the useless quantities and given only the equations."²³

Suspicion of eloquence is commonplace in the European rhetorical tradition but may have been salient for Kames and other advocates particularly in a criminal trial. Unlike civil trials at the time, criminal trials involved a fifteen-member jury selected by the presiding judges and consisting of people of similar social condition to the accused and typically from the neighborhood of the crime or even people who participated in the capture of the accused.²⁴ Ramsay has observed: "In no country did the scale incline more to culprits than in Scotland at that period. The poorest, most friendless felon was defended by counsel, who, wishing to get a name, took sometimes unwarrantable liberties with law and evidence. . . . And what is worse, half-learned, pragmatistical jurors are often misled by declamation."²⁵ Tytler reports that Kames's style of pleading

²¹T. B. Smith, *Scotland: The Development of its Laws and Constitution* (London: Stevens and Sons, 1962) 91, 90. A brief overview of the legal process may be found in John W. Cairns, "Legal Theory," in Alexander Broadie ed., *The Cambridge Companion to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 2003) 222–42 (pp. 229–30). For more detail, see Nicholas Phillipson, "The Scottish Whigs and the Reform of the Court of Session 1785–1830," diss. University of Cambridge, 1967 (Edinburgh: The Stair Society, 1990), 45–6; John A. Inglis, "Eighteenth Century Pleading," *Juridical Review* 19 (1907–08): 42–57; and Ross, *Kames*, cited in n. 1 above, pp. 123–30

²²Ramsay, *Scotland*, vol. 1, cited in n. 1 above, p. 51.

²³Boswell, *Private*, cited in n. 1 above, p. 272.

²⁴J. Irvine Smith, "Criminal Procedure," *An Introduction to Scottish Legal History* (Edinburgh: Stair Society, 1958) 426–48 (p. 441).

²⁵Ramsay, *Scotland*, vol. 1, cited in n. 1 above, pp. 188–9.

"awakened no suspicion of rhetorical artifice."²⁶ Defending Kames against the charge that he was too severe—Kames is reported to have delivered a verdict of guilty to his chess companion, Mathew Hay, accused of a capital crime with: "That's checkmate to you, Mathew!"²⁷—Tytler explains that one of the judge's duties is "to restrain the more natural, and therefore more frequent attempts of the prisoner's counsel to pervert the law, and confound the limits of justice in the minds of the jury."²⁸ These observations show that copious eloquence was a live option—that Kames could have chosen to write a rhetoric of legal advocacy in the classical vein. But in part because copious eloquence would be inappropriate in these and other circumstances, and because Kames's talents were not well-suited to this kind of eloquence, he did not write a rhetoric of legal advocacy.

SOCIAL ASPIRATIONS

Nor would a legal rhetoric have gained him the notice that *Elements* did. Kames's decision to write a rhetoric of criticism had a legal precedent in his decision to study and write about law; as law helped him to fulfill social aspirations, so did criticism. The eldest son in a family of perhaps nine children, Kames may initially have been sent to Edinburgh as an apprentice to a neighbor, who was a Writer to the Signet, to prepare himself to manage his father's estate which he described to Boswell as "under a load of debt" due to his father "being a Sportsman, keeping hounds, etc."²⁹ Writers to the Signet were essentially legal clerks. Training for this position was practical rather than academic; it involved a three- to five-year apprenticeship intended to provide "a knowledge of the structure of deeds, and of the form of process before the Court of Session."³⁰

²⁶Tytler, *Memoirs*, vol. 1, cited in n. 1 above, p. 62.

²⁷See Ross, *Kames*, cited in n. 1 above, pp. 301–11 for the full story.

²⁸Tytler, *Memoirs*, vol. 2, cited in n. 1 above, p. 3.

²⁹Boswell, *Private*, cited in n. 1 above, pp. 268, 269. See also Ramsay, *Scotland*, vol. 1, cited in n. 1 above, p. 183. Kames's father was engaged in a series of lawsuits from 1725, two years after Kames was admitted to the Faculty of Advocates, to 1735. By 1727 Kames could help to discharge the debts on the estate but did not completely free it from debt until 1752 (Ross, *Kames*, cited in n. 1 above, p. 5).

³⁰Phillipson, cited in n. 21 above, p. 10; Ramsay, *Scotland*, vol. 1, cited in n. 1 above, p. 181.

A position as Writer to the Signet would have been appropriate for a person in Kames's socioeconomic circumstances,³¹ but it probably would not have enabled Kames to attain the aspirations he developed during his apprenticeship.³² Boswell recorded Kames's recollection of a key incident:

One day I was sent with some paper to the Lord President's (Dalrymple's). I was kept waiting in an outer room. I heard delightful Musick upon a harpsichord in the next room, and I meditated on the hardship of there being such distinctions amongst Mankind. 'Why are the people in that room enjoying such happiness, and I kept in a mean, drudging way? Were I but fortunate enough to be on the other side of that Wall!' I afterwards came to be very intimate in the Family, and reflected on my former meditation.³³

Thus Kames developed an aspiration to become an advocate before the Court of Session. Since he was stationed at the lower end of landed society, he could not afford to study civil law at a continental university; the cost of study for a position on the Faculty of Advocates may have seemed prohibitive.³⁴ But Kames privately studied Latin,

³¹Ramsay, *Scotland*, vol. 1, cited in n. 1 above, p. 181; Tytler, *Memoirs*, vol. 1, cited in n. 1 above, p. 11.

³²Perhaps the pinnacle of the profession was managing the estate of one of the great landowners, but this would be available to only a few. Although conditions for Writers of the Signet appear to have improved as the century continued, "it was a far less aristocratic body than the faculty [of advocates], and probably poorer, for in the Society's minutes for 1731 there are references to many W.S.s who could not afford to live on their incomes" (Phillipson, cited in n. 21 above, p. 10; John Stuart Shaw, *The Management of Scottish Society: 1707–1764* (Edinburgh: John Donald, 1983), 35).

³³Boswell, *Private*, cited in n. 1 above, pp. 269–70. Tytler reports the same event with some additional and some slightly altered detail (*Memoirs*, vol. 1, cited in n. 1 above, pp. 12–4).

³⁴A position on the faculty of advocates would be most attractive to those between the lower end of landed society and sons of great landed families; those at the lower end were barred by the cost of study and those at the higher end chose not to enter due to lack of economic need and traditional prejudices (Shaw, *Management*, cited in n. 32 above, pp. 23–4). On admittance to the faculty, see John W. Cairns, "The Formation of the Scottish Legal Mind in the Eighteenth Century: Themes of Humanism and Enlightenment in the Admission of Advocates," in Neil MacCormick and Peter Birks eds., *The Legal Mind: Essays for Tony Honoré* (Oxford: Clarendon Press, 1986), 253–77 (pp. 255–58); Klaus Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries," trans. Sabine MacCormack, *Juridical Review* 17 (1972): 193–226 (p. 216); Tytler, *Memoirs*, vol. 1, cited in n. 1 above, p. 15; Shaw, *Management*, cited in n. 32 above, p. 27; Cairns, "Legal," cited in n. 21 above, pp. 226–27.

attended James Craig's private College of Civil Law, and qualified for admission in January 1723.³⁵

No doubt hoping for advancement, in his first published collection of decisions of the Court of Session Kames mentions that Dalrymple encouraged him to undertake the work; praises Dalrymple's "fondness to protect and encourage, whatever has the shew of rising merit;" and imagines that Dalrymple's "long and well ordered life" coupled with "the affluences of fortune, the prosperity of friends, and the applauses of mankind" must be a continual source of "delightful reflections."³⁶ His collections of decisions and later his *Principles of Equity* helped him to procure positions on the benches of the Courts of Session and Justiciary.³⁷ His decisions to practice law and publish legal works were part of a program of personal advancement.

Kames's positions on the supreme civil and criminal courts in Scotland were crown appointments, so fulfilling his aspirations required fashioning himself a good British subject.³⁸ Scots law was one of the few institutions that Scotland maintained following union with England in 1707. But separate legal systems produced problems. Scottish and English land tenure and conveyancing law had significantly diverged from each other, for example, and appeals could be made from the Court of Session to the House of Lords. This worried Scots because there was no statutory provision for the presence of a Scottish judge, and an English judge often heard and determined these appeals in the absence of any person with training in Scots law.³⁹ Kames's fear of English judges not knowing Scots law was typical. In *Historical Law-Tracts* he expresses the hope that by treating subjects common to both English and Scottish law he will suggest the advantages of "establishing publick professors of both laws, and giving suitable encouragement for carrying on together the study of

³⁵Ross, *Kames*, cited in n. 1 above, p. 14. On Kames's admittance see Ramsay, *Scotland*, vol. 1, cited in n. 1 above, p. 180; Boswell, *Private*, cited in n. 1 above, p. 270; Ross, *Kames*, cited in n.1 above, p. 25; *The Minute Book of the Faculty of Advocates, 1713-1750*, ed. John Macpherson Pinkerton (Edinburgh: Stair Society, 1980), 59.

³⁶Lord Kames, *Remarkable Decisions of the Court of Session. From 1716 to 1728*, 2nd ed. (1728; Edinburgh, 1790), iv.

³⁷See Ross, *Kames*, cited in n. 1 above, chs. 7 and 12.

³⁸Kames was initially passed over for a position on the bench of the Court of Session due to his father being a Jacobite and participating in the 1715 rebellion (Ross, *Kames*, cited in n. 1 above, pp. 113-5).

³⁹See E. J. MacGillivray, "The Influence of English Law," in *An Introductory Survey of the Sources and Literature of Scots Law* (Edinburgh: Stair Society, 1936), 207-25 (pp. 218-20).

both."⁴⁰ He portrays himself as a "Briton who wishes a more compleat Union."⁴¹

Kames, like his contemporaries, was also interested in reforming Scots law, with its origins in feudalism, in part to address the circumstances of union with England and participation in the burgeoning British economy and empire. One holdover from feudal law involved entails—"binding legal formulations which control succession and prevent heirs from disposing of land or contracting debt."⁴² In *Historical Law-Tracts* Kames criticized the law of entail for, among other things, subverting industry and commerce.⁴³ Kames advocated abolishing entail which would also make Scots law more in line with English law. Freeing land for commerce and promoting industry would contribute to the Scottish and British economy. Kames could have supported entails; most members of the Court of Session did. But Kames took a position supported by English judges.⁴⁴

Kames participated in other areas involving legal reform that could help Scotland's position in the British empire. Antipathy between the Scots and English came to a head with the 1745 Jacobite Rebellion. After its suppression, the British government took steps to integrate the Scottish Highlands into the British economy. It passed the Heritable Jurisdiction Act of 1747, which put Highland land under royal jurisdiction, but it also attempted to put money from this confiscated land back into the economy by subsidizing basic industries and establishing schools for teaching linen production and English. Kames was a Commissioner for the Forfeited Estates and involved in schemes for Highland improvement.⁴⁵ In short, Kames's legal career and writings enabled him to fashion himself a British patriot and thereby earn crown appointments which, in turn, enabled him to fulfill his social aspirations.

Kames had these legal precedents at hand as his aspirations turned to literary fame. According to Ramsay, after Kames was appointed Lord Ordinary on the Court of Session in 1752 his "passion for literary fame engrossed his thoughts."⁴⁶ Ramsay criticizes

⁴⁰Lord Kames, *Historical Law-Tracts*, vol. 1 (Edinburgh, 1758), xiii.

⁴¹*Historical*, vol. 1, cited in n. 40 above, p. xv.

⁴²Ross, *Kames*, cited in n. 1 above, p. 210.

⁴³Kames, *Historical*, vol. 1, cited in n. 40 above, p. 218. Kames appended a sketch on entail to *Sketches of the History of Man*.

⁴⁴Ross, *Kames*, cited in n. 1 above, pp. 211–2.

⁴⁵Linda Colley, *Britons: Forging the Nation 1707–1837* (New Haven: Yale University Press, 1992), 119–20; Ross, *Kames*, cited in n. 1 above, pp. 316–22.

⁴⁶Ramsay, *Scotland*, vol. 1, cited in n. 1 above, p. 187.

Kames for first spending Sundays and then Mondays—when the Court of Session did not sit—composing rather than reading session papers, and later for composing during “that part of the mornings and evenings which he used to set apart for his Outer and Inner House business.”⁴⁷ Among the works composed during this time was *Elements*.

Kames could fulfill his aspirations with a well-received book on criticism because, like other Scottish *literati*, Kames aimed to rid his writing of Scotticisms and write proper English. Ramsay reports that “the language of [Kames’s] social hour was pure Scots, nowise like what he spoke on the bench, which approached to English.”⁴⁸ Something of his accent may be gleaned from an anecdote which finds him nodding off on the bench and, when awakened by someone’s entrance and told, “Oh! it’s a woman, my Lord, accused of child murder,” responding, “And a weel farred bitch too.”⁴⁹ Kames’s efforts to write proper English were common to Scots; in his *Critical Review* Smollett pointed to impurities and errors in the language of the books reviewed, including Scotticisms; the rhetorics of Smith, Campbell, and Blair focused on the English language rather than Scots.⁵⁰ In *Elements* Kames fashions himself a good British subject in part by setting apart its critical method from that of the French;⁵¹ citing Britons’ claim to literary fame, Shakespeare, significantly more often than any other author;⁵² and dedicating the book to King George III. *Elements* addressed the provincialism that could interfere with Kames’s literary aspirations. Moreover, by participating in the broader cultural move

⁴⁷Ramsay, *Scotland*, vol. 1, cited in n. 1 above, p. 187.

⁴⁸Ramsay, *Scotland*, vol. 1, cited in n. 1 above, p. 211–2.

⁴⁹Ross, *Kames*, cited in n. 1 above, pp. 72, 303; see also Clausdirk Pollner, “English, Scots and the Scottish Literati,” in Peter L. Oesterreich and Thomas O. Sloane eds., *Rhetorica Movet: Studies in Historical and Modern Rhetoric in Honour of Heinrich F. Plett* (Leiden: Brill, 1999), 335–41.

⁵⁰See Pollner, “English,” cited in n. 49 above, and James G. Basker, “Scotticisms and the Problem of Cultural Identity in Eighteenth-Century Britain,” *Eighteenth-Century Life* 15 (1991): 81–95. Various degrees of contempt for the Scottish critic may be seen in Voltaire and Johnson (Ross, *Kames*, cited in n. 1 above, pp. 285–6; Theodore Besterman, “Voltaire on Shakespeare,” *Studies on Voltaire and the Eighteenth Century* 54 (1967), 85–9; Boswell, *Life*, cited in n. 10 above, pp. 414–5). For the Scottish and English rivalry more broadly, see Colley, *Britons*, cited in n. 45 above, pp. 117–32 and Paul Langford, *A Polite and Commercial People: England 1727–1783* (Oxford: Oxford University Press, 1989), 327–9.

⁵¹On French antecedents of Scottish rhetoric, see Barbara Warnick, *The Sixth Canon: Belletristic Rhetorical Theory and French Antecedents* (Columbia: University of South Carolina Press, 1993).

⁵²Manolescu, “Motives,” cited in n. 5 above.

toward a "polite" belletristic style rather than civic "eloquence," Kames aligned himself politically with Court against Country, Whig against "mob"—another step toward achieving social aspirations.⁵³ His legal career had set a precedent for choosing subject matter, publishing on it, and fashioning himself a good British subject as a way of addressing personal ambitions.

PEDAGOGICAL PURPOSES OF PRINCIPLES OF HUMAN NATURE

As Kames's legal works offered a precedent for using a critical work to help him fulfill his aspirations, so the use of principles of human nature in both kinds of works could help others to fulfill theirs. Principles of human nature contributed to the pedagogical aims of Kames's legal and critical programs.⁵⁴ Specifically, principles of human nature could serve as an alternative to reasoning by authority and as an entrée to specialized, technical reasoning. Kames's project of tracing law and criticism to principles of human nature was motivated in part by his own education. Kames complained about his early training in language and law that he was not taught the meaning behind rules. He reported to Boswell that his first tutor "made me get Despauter's grammar by heart" and described this grammar as his "daily persecution during the most important period of life."⁵⁵ The problem with the method of instruction, according to Kames, was that he "had not the least notion of what the rules meant. . . . After an interval of three years, I took up Despauter's Grammar and found I knew nothing of the matter, and then I began to study Grammar philosophically."⁵⁶ Similarly, Kames complained about his early legal training: "There was a notion then (but a very erroneous one) that the best education for a Lawyer was to be some years in a Writer's Chamber. I think this the worst education. It is

⁵³Potkay, *Fate*, cited in n. 18 above, pp. 3–7.

⁵⁴On Kames's use of principles of human nature in his criticism and legal thought in the context of the history of ideas, see Bevilacqua, "Rhetoric," cited in n. 12 above and "Lord," cited in n. 6 above; MacCormick, "Law," cited in n. 3 above, pp. 157–8, 160; Forbes, "Natural," cited in n. 2 above, p. 197; Lieberman, "Legal" and *Province*, cited in n. 3 above. It became commonplace for Enlightenment thinkers to ground a variety of disciplines in human nature.

⁵⁵Boswell, *Private*, cited in n. 1 above, p. 269; Lord Kames, *Loose Hints upon Education, Chiefly concerning the Culture of the Heart* (Edinburgh, 1781), 251–2.

⁵⁶Boswell, *Private*, cited in n. 1 above, p. 269.

consuming so much time in mere copying of Styles. The meaning is never explained."⁵⁷

The preface to *Elucidations on the Common and Statute Law of Scotland* resonates with his complaints about his early education: "What are our law-books but a mass of naked propositions, drawn chiefly from the decisions of our supreme courts, rarely connected either with premises or consequences."⁵⁸ The problem is that "law-students, trained to rely upon authority, seldom think of questioning what they read: they husband their reasoning faculty, as if it would rust by exercise."⁵⁹ Kames hopes "only to give examples of reasoning, free from the shackles of authority."⁶⁰ For Kames this means, in part, grounding legal principles in human nature.

To see how principles of human nature serve as an entrée to more specialized and technical legal reasoning, compare the beginning of his discussion of *jus tertii* in *Essays Upon Several Subjects in Law* (1732) with a revision of the essay in *Elucidations*.⁶¹ In *Several Subjects* Kames explains the principle of *jus tertii*—"When a Man pleads any Point, in which he has no LEGAL INTEREST, i.e. from the gaining of which he can propose to himself no just or reasonable Advantage, he is remov'd *personali objectione* from pleading such Point"—with a broad legal principle: "For the Law encourages no Man to stand in the Way of his Neighbour, unless his own Interest be at Stake."⁶² In *Elucidations* in contrast he deduces the legal principle from a principle of human nature: "No rational man ever acts unless with an intention to produce some effect. Therefore, in a court of justice, however well founded an action or a defence may be in itself, it will be rejected as idle and foolish, if the person who acts can draw no benefit from it, or have no interest in it, as expressed in law-terms. Hence a rule, That right without interest will not be sustained in a process, either by way of action or objection: and as little will interest without

⁵⁷Boswell, *Private*, cited in n. 1 above, p. 269. By "copying of Styles" Kames meant the examples of summonses and letters which passed the Signet and were included in style books.

⁵⁸Lord Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (Edinburgh, 1777), vii.

⁵⁹Kames, *Elucidations*, cited in n. 58 above, vii–viii.

⁶⁰Kames, *Elucidations*, cited in n. 58 above, xii.

⁶¹*Several Subjects* consists of four essays on four different titles. Three of them were revised and reprinted in *Elucidations*, a work that covers forty-two titles. In *Elucidations* "Jus Tertii" is Article XXXII, "What Interest is sufficient to entitle one to sue or defend." The other essay in *Several Subjects* is incorporated into *Principles of Equity*.

⁶²Lord Kames, *Essays Upon Several Subjects in Law* (Edinburgh, 1732), 1.

right."⁶³ I submit that, since Kames composed *Several Subjects* for legal professionals⁶⁴ but directed *Elucidations* in part to law students, he incorporated principles of human nature into the latter in part to make it more accessible to beginning students.

Elucidations is published after *Elements*, but Kames's *Historical Law-Tracts* offered a precedent for using principles of human nature for pedagogical purposes in *Elements*. In the preface to *Historical Law-Tracts* Kames complains: "Law, like geography, is taught as if it were a collection of facts merely: the memory is employed to the full, rarely the judgment."⁶⁵ He proposes to remedy this problem by making law "a rational study."⁶⁶ He imagines a broader audience than legal specialists; he aims not for "the vulgar"—those who are more interested in subjects like wars and conquests which "excite wonder"—but instead for "readers of solid judgment [who] find more entertainment in studying the constitution of a state, its government, its laws, the manners of its people: whose reason is exercised in discovering causes and tracing effects through a long train of dependencies."⁶⁷ He also describes his audience as "every man of taste who is desirous to acquire the true spirit of law."⁶⁸

The broader audience helps to account for the use of principles of human nature in the first three tracts. The opening sentences of the first tract, "History of Criminal Law," note that "a class of principles" that are part of "the human System" are "the Source of the criminal Law"; that these principles are "obviously intended to promote Society"; and that "to form a just notion of them, we need but reflect upon what we feel when we commit a Crime, or witness it."⁶⁹ The next two tracts, "History of Promises and Covenants" and "History of Property," also open with discussion of the foundation of legal principles

⁶³Kames, *Elucidations*, cited in n. 58 above, p. 213.

⁶⁴He also sought professional notice; in the same year the essays were published, he unsuccessfully applied for the Chair of Roman Law at Edinburgh University (Ross, *Kames*, cited in n. 1 above, p. 36), but Tytler reports that the essays "procured to their author the character of a profound and scientific lawyer; and from the period of their publication, we find Mr Home engaged in most of the causes of importance which occurred in the Court of Session" (*Memoirs*, vol. 1, cited in n. 1 above, p. 80).

⁶⁵Kames, *Historical*, vol. 1, cited in n. 40 above, p. v. Ross "Scots," cited in n. 4 above, p. 620 and *Kames*, cited in n. 1 above, pp. 263–4 suggests that Kames follows Stair in this complaint.

⁶⁶Kames, *Historical*, vol. 1, cited in n. 40 above, p. v.

⁶⁷Kames, *Historical*, vol. 1, cited in n. 40 above, pp. vi–vii.

⁶⁸Kames, *Historical*, vol. 1, cited in n. 40 above, p. viii.

⁶⁹Kames, *Historical*, vol. 1, cited in n. 40 above, p. 1.

in human nature, in passion, particularly.⁷⁰ Subsequent tracts are narrower in scope and more technical, dealing with particular questions respecting property, jurisdiction, and forms of process, for example. They involve almost no use of principles of human nature, probably because many of them are relevant to property so it would be redundant to repeat the philosophical analysis of the earlier tracts.⁷¹ Still, the use of principles of human nature in the first tracts fulfills the pedagogical function of preparing students for more specialized and technical reasoning in subsequent tracts.⁷²

Kames described the pedagogical program of *Elements* in similar terms, noting that

the ordinary method of education [. . .] after some years spent in acquiring languages, hurries us, without the least preparatory discipline, into the most profound philosophy. A more effectual method to alienate the tender mind from abstract science, is beyond the reach of invention: and accordingly, with respect to such speculations, our youth generally contract a sort of hobgoblin terror, seldom if ever subdued.⁷³

The solution is to study criticism as a rational science. Criticism becomes a rational science by studying “the sensitive branch of human nature, to trace the objects that are naturally agreeable, as well as those that are naturally disagreeable,” not by appealing to authority.⁷⁴ Learning about “the sensitive branch” or principles of human nature prepares students to reason upon more difficult subjects:

⁷⁰Kames, *Historical*, vol. 1, cited in n. 40 above, pp. 91–2, 124–6.

⁷¹On property see Tract IV, “History of securities upon land for payment of debt;” Tract V, “History of the privilege which an heir-apparent in a feudal holding has, to continue the possession of his ancestor;” and Tract VI, “History of regalities, and of the privilege of replying.” The latter tract leads to discussions of jurisdiction in Tracts VII, VIII, and IX. Tracts X, XI, and XII cover issues relating to debt which leads to Tract XIII on heirs and Tract XIV on the valuation of land and the claim of an heir apparent to a predecessor’s land.

⁷²Kames’s use of principles of human nature in his legal writings could also contribute to legal reform more broadly by serving as a way to rationalize the study of law. His use of such principles in *Historical Law-Tracts* gained him notice in France where some of the early tracts were translated into French and he was invited to join an international Society of Citizens organized to perfect moral science and legislation (Ross, *Kames*, cited in n. 1 above, pp. 216–8). As nation-states attempted to reform their legal systems (Luig, “Institutes,” cited in n. 34 above), making law rational would be appealing. I choose to highlight the pedagogical motive of using such principles because Kames does.

⁷³Lord Kames, *Elements of Criticism*, 6th ed., vol. 1, (Edinburgh, 1785), 8.

⁷⁴Kames, *Elements*, vol. 1, cited in n. 73 above, pp. 6, 12.

the science of criticism may be considered as a middle link, connecting the different parts of education into a regular chain. This science furnisheth an inviting opportunity to exercise the judgement: we delight to reason upon subjects that are equally pleasant and familiar: we proceed gradually from the simpler to the more involved cases: and in a due course of discipline, custom, which improves all our faculties, bestows acuteness on that of reason, sufficient to unravel all the intricacies of philosophy.⁷⁵

Kames's pedagogical purposes in *Elements* include making criticism accessible for select members of the middling classes.⁷⁶ Kames assigns the practice of criticism to a middling audience as he notes that taste is the province of neither the vulgar nor voluptuousness—neither those who depend on bodily labor nor those corrupted by riches.⁷⁷ Kames contrasts the values of the rich with those of a middling audience: the rich indulge in “costly furniture, numerous attendants, a princely dwelling, sumptuous feasts, every thing superb and gorgeous, to amaze and humble all beholders: simplicity, elegance, propriety, and things natural, sweet, or amiable, are despised or neglected.”⁷⁸ He positions criticism as a pastime preferable to other activities and pursuits that those of middling status may engage in: in youth, hunting, gaming, and drinking; in middle age, ambition; in old age, avarice.⁷⁹ Thus Kames stakes out a territory for select members of the middling classes.

The role of reasoning upon feeling in his critical program is highlighted by his *Introduction to the Art of Thinking*.⁸⁰ The book is designed for a young audience and consists of chapters of lists of maxims and a section of historical and allegorical illustrations. Kames explains how the maxims and illustrations are designed to exercise the reasoning faculty: “The historical illustrations are put at the end of the book, that young readers may exercise themselves in drawing morals from them. After fixing upon a moral, they will be curious to compare it with the moral or maxim in the foregoing part, which they

⁷⁵Kames, *Elements*, vol. 1, cited in n. 73 above, pp. 8–9.

⁷⁶For more detail on criticism and socioeconomic status, see Manolescu, “Motives,” cited in n. 5 above, pp. 14–6 and Manolescu, “Traditions,” cited in n. 5 above, pp. 237–9.

⁷⁷Kames, *Elements*, vol. 2, cited in n. 73 above, pp. 499–502.

⁷⁸Kames, *Elements*, vol. 2, cited in n. 73 above, p. 500.

⁷⁹Kames, *Elements*, vol. 1, cited in n. 73 above, p. 9.

⁸⁰Cairns, “Rhetoric,” cited in n. 14 above, pp. 37–8 has also drawn a parallel between Kames's desire for improvement in legal education and *Introduction to the Art of Thinking*.

cannot mistake, as every maxim and its illustration have the same number. This exercise may at first be difficult; but perseverance will render it easy, and in time delightful."⁸¹ The key is to abstract from the illustration a relevant principle of human nature. Kames puts this project in a pedagogical context: instead of leaping from studies of particulars such as geography and history to abstract studies such as logic and metaphysics, Kames recommends his *Art of Thinking* as an intermediate link designed to improve the ability to abstract by providing human nature as a familiar, agreeable, and instructive subject to reason upon.⁸² Thus principles of human nature may not only be a part of the reasoning in Kames's legal and critical works, but may also serve as subject matter to reason upon.

This kind of pedagogical concern helps to explain the length of *Elements*. Paging through the book, particularly the chapters applying critical principles, shows the many extracts from authors that Kames includes. There is plenty of material upon which to reason and exercise judgment. Likewise, in the preface to his 1741 dictionary of decisions, he asserts:

Most of our knowledge, especially that of law, is by induction. It must, therefore, be of singular use to such as apply themselves to this study, that there are at hand a great number and variety of cases, ready invented, upon which they may exercise their reason. . . . It seems plain then, that a variety of law cases, tho' but barely proposed, must be of advantage: They are a stock of materials for the mind to work upon; an opportunity is afforded us to apply principles, the judgment is exercised, and by exercise ripens to its perfection.⁸³

As the next section shows, the process of compiling these collections of decisions and the kind of reasoning Kames recommends in *Elements* involve the same kind of abstraction of principles from a case that Kames recommends as an exercise in *Art of Thinking*.

MODE OF REASONING

Legal reasoning in Scots law involves a mix of the civilian and English Common Law traditions—the civil tradition deriving from

⁸¹Lord Kames, *Introduction to the Art of Thinking*, 3rd ed. (Edinburgh, 1775), viii.

⁸²*Introduction*, cited in n. 81 above, pp. iv-v.

⁸³Lord Kames, *The Decisions of the Court of Session, from its first Institution to the Present Time. Abridged, and Digested under proper Heads, in Form of a Dictionary*, 2nd ed. (1741; Edinburgh, 1791), vi-vii.

continental influences and the English from union with England. Lord Cooper has described the differences between the two methods of reasoning as follows, noting that he deliberately overstates the position "with the object of throwing an elusive object into high relief."⁸⁴

A civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" and the second asking aloud in the same situation, "What did we do last time?" The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies. The civilian is chiefly concerned with the policy and rationale of a rule of law, the common lawyer with its pedigree. The instinct of the civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*.⁸⁵

These two kinds of reasoning are blended in the attempt to identify *rationes decidendi*, the clarification of which is the practical purpose of Kames's collections of decisions of the Court of Session. The *ratio decidendi* is the principle underlying a judicial decision or the proposition of law that is the basis of the decision. It is abstracted from the allegations, facts, arguments, opinions, and judgment of a case. For example,

to say that a man is entitled to recover damages from one who has caused him loss, injury or damage without legal justification is a general principle from which may be deduced, in the circumstances of an actual case, the *ratio* that if a defender has caused another person loss and damage by knocking him down with his car, an action lacking legal justification, the other person may recover damages from the defender.⁸⁶

⁸⁴Thomas Mackay Cooper, "The Common and the Civil Law—A Scot's View," *Harvard Law Review* 63 (1950): 468–75 (p. 471).

⁸⁵Cooper, "Common," cited in n. 84 above, pp. 470–71.

⁸⁶David M. Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law*, 3rd ed. rev. (Edinburgh: Green and Sons, 1969), 357. Other material on the *ratio decidendi* is taken from the same source, pp. 356, 349–50. See pp. 349–50 n. 27 for periodical literature on *ratio decidendi*. Walker describes the task of determining the *ratio decidendi* as one "of extreme importance and considerable difficulty for which unfortunately no settled formula or rules of thumb can be suggested; it cannot be done mechanically; it is an art rather than a science" (349).

Kames said that he did not "like to recollect" the amount of time spent working on the dictionary of decisions: "The difficulty was to trace the steps which led to each decision, to find out a *ratio decidendi* and place it under a head. . . . I have been ten hours studying one decision to fix its proper principle and place."⁸⁷

The identification and use of *rationes decidendi* in cases of Scots law served as a precedent for Kames's identification and use of principles of human nature relevant to particular performances in the fine arts. In Kames's model of critical argument, principles of human nature may be said to serve as *rationes decidendi* for judgments upon performances in the fine arts. The following remarks on a passage from Otway's *Venice Preserv'd* illustrate the point: "Figurative expression, being the work of an enlivened imagination, cannot be the language of anguish or distress. Otway, sensible of this, has painted a scene of distress in colours finely adapted to the subject: there is scarce a figure in it, except a short and natural simile with which the speech is introduced."⁸⁸ Kames takes the case of the passage from Otway and pronounces a decision: the passage is good because it is a scene of distress with almost no figures in it. The principle of human nature that functions as a *ratio* is that anguish or distress cannot manifest itself in figurative expression. This *ratio* may be deduced from the general principle that figurative expression is the work of an enlivened imagination.

We can imagine Kames poring over an edition of Shakespeare, identifying passages that to him are pleasing or displeasing, and searching for a *ratio* that he could use to justify his critical judgment. And we can imagine readers of *Elements* learning to do the same. If I want to justify my decision that Hamlet's "To be or not to be" soliloquy uses a flawed metaphor (how can one *take arms* against a *sea* of troubles?), I search for a *ratio* involving not a legal system but the system of human nature, perhaps discovering something along these lines: metaphors must be literally imaginable.

Conceiving of principles of human nature as *rationes decidendi* refines the position that the principles serve as warrants for critical judgments and helps to explain the organization of the book.⁸⁹ Conceiving of the warrants in critical judgments as *rationes decidendi* asks us to distinguish general principles of human nature, such as those

⁸⁷Quoted in Walker, *Jurists*, cited in n. 1 above, p. 224.

⁸⁸Kames, *Elements*, vol. 1, cited in n. 73 above, pp. 497–8.

⁸⁹See Manolescu "Motives" and "Traditions," cited in n. 5 above; compare Ross, "Scots," cited in n. 4 above, p. 622 and Kames, cited in n. 1 above, p. 265.

found in the opening two chapters, from the rules involving practical examples of the principles in a particular performance in the fine arts, such as those found in the next nine chapters.⁹⁰ Thus Kames takes human nature as a source of general principles, from which may be deduced in the circumstances of a particular performance a practical example of a general principle in the form of a statement about human nature with respect to the fine arts. Such a view helps to explain why Kames first offers general principles of human nature as distinct from those particularly relevant to the fine arts. Moreover, it helps to explain the observation that “there is a vast proliferation of principles appropriated to the various classes of phenomena, all attested by an appeal to sense and feeling.”⁹¹ Understanding the principles of human nature as *rationes decidendi* helps to explain why Kames is not inclined to reduce the number of principles.

The aim of identifying the critical and legal principles is to reach a standard. In the dictionary of decisions Kames observes that decisions help law progress toward a standard. Kames remarks that, compared to Roman law, Scots law was inferior because it had had less time to mature than the Roman law. No art or science, according to Kames, requires more time than jurisprudence “to ripen it and to bring it to a standard.”⁹² Kames refers to a time when the law of Scotland “shall be brought to a standard, (which may be expected in length of time, if due care be taken of providing us with able judges).”⁹³ How he believes Scotland will achieve this standard is noteworthy: general rules will be formed through the induction of many cases. The problem with statute law is that statutes “enact in general upon all similar cases; and as man is but short sighted with regard to consequences, ‘tis odds but, in remedying one evil, a greater is produced.”⁹⁴ The decisions of a court of justice, in contrast, “are adapted to particular circumstances. If upon any occasion they chance to stray, ‘tis but to return again, with greater certainty of the road. They creep along with wary steps, until, at last, by induction of many cases, which have been fixed in the course of practice, a

⁹⁰Kames, *Elements*, vol. 1, cited in n. 73 above, pp. 195–6.

⁹¹Hipple, cited in n. 12 above, p. 100. A review in *The Library* 2 (May 1762) criticizes *Elements* in part because Kames “multiplies the principles of human nature without cause” (261). Arthur Murphy may have also had this in mind as he commented that it seems “as if he had been for years anatomising the heart of man, and peeping into every cranny of it” (Boswell, *Life*, cited in n. 10 above, pp. 414–5).

⁹²Kames, *Decisions*, cited in n. 83 above, p. v.

⁹³Kames, *Decisions*, cited in n. 83 above, p. vii.

⁹⁴Kames, *Decisions*, cited in n. 83 above, p. vii–viii.

general rule is with safety formed."⁹⁵ Discovering *rationes decidendi*, then, may be understood as a step in improving Scots law, in helping it to reach a standard. Likewise, Kames's discovery of principles of human nature that ground judgment of performances in the fine arts is designed to help taste progress to a standard.⁹⁶ Reaching these standards may lead to individual advancement. For Kames they also leave Scots better positioned with respect to Britons, and Britons better positioned in the republic of letters.

CONCLUSION

A close look at Kames's social aspirations, pedagogical aims, and modes of reasoning reveals that Kames's legal career and works offered precedents for *Elements*. These precedents suggest that his jurisprudence may have shaped the nature of the critical reasoning Kames uses in *Elements*, its selection of texts for critical examination, its organization, and its length. For example, the preponderance of passages from Shakespeare contributes not only to social advancement but also provides familiar material to reason upon. Passages from Shakespeare and others not only serve this function but also illustrate principles of human nature in general and with respect to the fine arts—two levels of reasoning that resonate with the presence of general legal principles and *rationes decidendi* in Scots law, and that Kames treats separately and in sequence in *Elements*. The number of passages makes the book swell to multiple volumes but is consonant with the need to reason upon many cases in order to identify principles—a process that does not simply involve induction—and reach a standard. Reasoning by means of principles of human nature in both law and criticism contributed to Kames's reputation, in part because such reasoning made the subject matter and practices accessible for a broader audience.

⁹⁵Kames, *Decisions*, cited in n. 83 above, p. viii.

⁹⁶Kames, *Elements*, vol. 2, cited in n. 73 above, 503–4.

